IN THE

Supreme Court of the United States

October Term, 1967

No. 249

WYATT TEE WALKER, MARTIN LUTHER KING, JR., RALPH ABERNATHY, A. D. KING, J. W. HAYES, T. L. FISHER, F. L. SHUTTLESWORTH and J. T. PORTER,

Petitioners,

v.

CITY OF BIRMINGHAM, a Municipal Corporation of the State of Alabama

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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August, 1967

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Jewish Congress respectfully moves for leave to file a brief *amicus curiae* in support of the petition for hearing in the above entitled case. We have sought and obtained consent of the attorney for the petitioners. The attorney for the respondent, however, has refused consent.

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are committed particularly to preservation of the great freedoms guaranteed by the First Amendment and we have frequently submitted *amicus curiae* briefs in this Court with a view to

obtaining broad interpretation of those principles and their effective enforcement.

We seek leave to file an *amicus curiae* brief in this case because we believe that the decision of this Court in the last term gravely threatens effective enforcement of the guarantees of the First Amendment with respect not only to assertion of political views, as in the instant case, but with respect to the exercise of religious freedom. Indeed, the issue in this case is not unlike that considered in *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953), where this Court held, with Justices Black and Douglas dissenting, that a person desiring to hold religious services in a public park could be prosecuted for doing so without a license even though the license was wrongfully withheld.

History amply documents the use of governmental repression against minority religious expression. Such repression can be and has been manifested in the form of judicial restraints on unpopular religious advocacy. The decision of this Court, if allowed to stand, would greatly increase the potency of such judicial restraints and, to a corresponding extent, limit the effectiveness of the First Amendment guarantee of the free exercise of religion.

Accordingly, we ask leave to file the annexed brief *amicus curiae* in the hope of obtaining from this Court reconsideration of its present ruling.

Respectfully submitted,

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BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

This brief is submitted to this Court annexed to a motion for leave to file. The interest of the American Jewish Congress is stated in that motion.

We address ourselves here to a single question: Does effective enforcement of the guarantees of the First Amendment, as made applicable to the states by the Fourteenth, require that persons charged with violation of a state court injunction be permitted to assert First Amendment rights as a defense in contempt proceedings?

Argument

1. What is involved here is a balancing of the apparently competing needs of orderly government and First Amendment guarantees. Petitioners assert that their right to freedom of speech and association, as guaranteed by the First Amendment and made applicable to the states by the Fourteenth, is impaired by the rule applied by the Alabama courts. While there can be wide disagreement on the gravity of this impairment, there is no doubt that the impairment exists. The state, in response, asserts that orderly government would be disrupted if any violation of its outstanding injunctions were permitted. Here, too, it can be conceded that petitioners' position would entail some risks. We submit that, for the reasons stated below, the balance should be struck in favor of the "preferred" First Amendment rights.[1]

2. The First and Fourteenth Amendments were prompted by the assumption that government officials sometimes use their official power to restrain freedom of expression and that the Federal Government must be empowered to prevent such official abuses. The Alabama rule—and this Court's adoption of it in its decision of last term—rests, we submit, on the assumption that the Alabama courts will act promptly to prevent such abuses. This, we submit, is not a constitutionally permissible assumption in a case of this kind. It cannot be assumed that wrongful injunctions, impairing First Amendment rights, will not

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1. *Thomas* v. *Collins*, 323 U. S. 516, 530 (1944); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); Cahn, *The Firstness of the First Amendment*, 65 Yale L. J. 464 (1956).

normally be issued or left in effect by state courts for the purpose of suppressing dissent. The First and Fourteenth Amendments proceed on precisely the opposite assumption —that there is a substantial possibility of restraint by abuse of official power. Those Amendments empower the Federal courts to deal with such abuses and to do so effectively.

A rule requiring those subject to an injunction to seek its removal before engaging in the enjoined conduct necessarily restrains that conduct for at least a brief period. Legal process can be expedited but it cannot be made instantaneous. Nevertheless, if no more than the usual litigative delays were threatened, one could accept the Alabama rule as a reasonable accommodation to the needs of society.

Unfortunately, however, more than normal delay is likely to be involved in First Amendment cases such as this one. Litigative delay is one of the devices frequently resorted to by officials to suppress dissent. See, for example, the proceedings described in this Court's decision in *National Association for the Advancement of Colored People* v. *Alabama,* 377 U. S. 288 (1964), in which the courts of Alabama delayed for six years or more implementation of this Court's decision in *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449 (1958).

Advocacy of unpopular causes is peculiarly susceptible to repression by temporarily imposed silence. Organizing and financing the advancement of a new religious sect, for example, is precarious under the most favorable conditions. Small sects do not have the resources to send their emis-

saries into communities if it is necessary first to start a campaign, then to fend off an assault in the courts and then to start the campaign over again a year or so later. The mere issuance of an injunction, if it must be obeyed until lifted, is normally enough to halt further activity in the area affected. Thus, the Alabama rule makes it relatively easy for communities to immunize themselves against exposure to minority views.

The function of the First Amendment is not merely to condemn official action that curbs expression of unpopular views but also to prevent it. Under our system of government, the Federal courts, and particularly this Court, have responsibility for applying sanctions to insure that expression is in fact free.

The Fourteenth Amendment, which made the restraints of the First applicable to the states, was expressly aimed at official action. Indeed, those who drafted it were fully aware of the role frequently played by state courts, in combination with other state officials, in denying rights guaranteed by the Federal Constitution. Thus, this Court must guard against action not only by state legislative bodies and executive officials but also by state courts.

The restraint which petitioners here challenge as unconstitutional represents action by all three branches of the state government—the legislative branch which enacted the parade ordinance, the officials who sought the court injunction and the courts which granted it. This is precisely the kind of situation which, under the First and Fourteenth Amendments, the Federal courts must cope with. We submit that they do not cope with it if they adopt a rule that

allows a state government, through its legislative, executive and judicial branches, to silence dissent for a period measured in months or even years.

3. This Court has recognized in other contexts that it is not enough merely to recognize the existence of a Federal constitutional right. Its function includes fashioning an effective remedy. Furthermore, this can and must be done even if it entails impairment of other values.

A striking example in this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which reversed the long-standing rule that evidence obtained in violation of Federal restraints on state law enforcement officers may be admitted in state court proceedings. In adopting the so-called "exclusionary rule" for the state courts in that case and for the Federal courts 75 years earlier in *Boyd* v. *United States*, 116 U. S. 616 (1886), this Court relied on the fact that, without it, "the protection of the Fourth Amendment * * * might as well be stricken from the Constitution" (116 U. S. at 393, quoted in *Mapp*, 367 U. S. at 648). The *Mapp* decision fully recognized that the exclusionary rule conflicted with one of the goals of orderly government—apprehending, convicting and punishing criminals (*id.* at 658-9). Nevertheless, it regarded the possible nullification of Fourth Amendment rights as compelling. Any doubt that this was the basis of the decision in *Mapp* was eliminated four years later in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), where this Court declined to make *Mapp* retroactive on the ground that its sole function was to inhibit police misconduct, a function that could only operate prospectively.